

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA,

Plaintiff,

v.

DON BREAZEALE & ASSOCIATES, INC.,
DONALD L. and IRENA B. BREAZEALE,

Defendants.

No.

COMPLAINT

The United States of America, by and through Jenny A. Durkan, United States Attorney for the Western District of Washington, and Harold Malkin and David R. East, Assistant United States Attorneys, acting on behalf of the United States Trade and Development Agency (“USTDA”) alleges as follows:

NATURE OF THIS ACTION

1. This action alleges that Defendants Don Breazeale & Associates, Inc, (“DBA”) and Donald L. and Irena B. Breazeale (collectively “Defendants”), breached contractual agreements with USTDA.

//

//

//

PARTIES

2. USTDA is an independent agency of the United States that provides foreign assistance. USTDA provides grant funding to overseas project sponsors for the planning of projects that support the development of modern infrastructure and an open trading system.

3. DBA was, until 2009, a California Corporation, founded by Irena B. and Donald L. Breazeale. Currently, DBA is a Washington Corporation. DBA focuses on pre-feasibility and feasibility studies, strategic planning, market research and financial engineering of both domestic and international port and rail projects.

4. Irena B. and Donald L. Breazeale are husband and wife, both of whom currently reside on Bainbridge Island, Washington.

JURISDICTION AND VENUE

5. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S. C. § 1331.

6. Personal jurisdiction and venue are proper in this district pursuant to 28 U.S.C. §§ 1391(b)(1) and 1395(a) because DBA is a Washington corporation located and doing business in this judicial district and because Donald L. Breazeale and Irena B. Breazeale reside in this judicial district.

BACKGROUND

A. USTDA

7. USTDA is a foreign assistance agency organized pursuant to § 661 of the Foreign Assistance Act of 1961, as amended (22 U.S.C. § 2421). USTDA's mission is to promote economic growth in developing and middle income countries. To accomplish that goal, USTDA provides grant funding to overseas project sponsors, typically foreign governmental entities, that allows those entities to enter into partnerships with U.S. businesses to provide private sector solutions to developmental problems.

8. The foreign assistance funding provided by USTDA comes from funds appropriated by Congress.

1 9. USTDA's grants typically support various forms of technical assistance; early
2 investment analysis, such as feasibility studies; training; and business workshops. The
3 focus of such projects is to support the development of a modern infrastructure in the host
4 countries.

5 **B. The Cape Verde Project**

6 10. On June 30, 2004, the United States, acting through USTDA, and the
7 government of Cape Verde, an island nation on the west coast of Africa, acting through
8 Empresa Nacional de Administracao dos Portos, S.A. ("ENAPOR"), Cape Verde's Port
9 Authority, entered into a grant agreement to facilitate a feasibility study of a potential
10 transshipment port development project ("Grant Agreement"). In accordance with the
11 Grant Agreement, ENAPOR selected DBA as the contractor to conduct the feasibility
12 study.

13 11. Pursuant to the Grant Agreement, USTDA agreed to provide ENAPOR with up
14 to \$420,432 to partially fund the cost of goods and services required to undertake the
15 feasibility study. Also pursuant to the Grant Agreement, DBA was obliged to cover up to
16 \$140,160 of the feasibility study costs, as part of the "cost sharing" requirement of the
17 Grant Agreement, a provision included in many USTDA grant agreements. The Grant
18 Agreement also included Terms of Reference ("TOR"), which set forth specific
19 responsibilities of the contractor, DBA.

20 12. On July 10, 2004, ENAPOR and DBA entered into a contract ("Contract") that
21 outlined the terms and conditions constituting the requirements of DBA's feasibility
22 study. The Contract included the same TOR incorporated into the Grant Agreement.

23 13. The Contract required DBA to provide USTDA with, among other things, a
24 Certified Statement of Expenditures establishing and detailing the costs of undertaking
25 the feasibility study, as well as demonstrating that DBA had funded its previously agreed
26 upon share of the costs associated with the feasibility study.

27 //

28 //

1 14. The Contract also required that DBA and any subcontractors “maintain, in
2 accordance with generally accepted accounting procedures, books, records, and other
3 documents, sufficient to reflect properly all transactions under or in connection with the
4 contract.” The Contract further stipulates that, “books, records, and other documents
5 shall clearly identify and track the use and expenditure of USTDA funds, separately from
6 other funding sources.”

7 15. Previously, on June 30, 2004, DBA and USTDA executed a Success Fee and
8 Cost Share Agreement. The Success Fee and Cost Share Agreement required DBA to
9 provide USTDA a Certified Statement of Expenditures, which is a detailed breakdown of
10 costs incurred to complete the full TOR, as incorporated into the Contract. The Success
11 Fee and Cost Share Agreement provided that (1) “[i]f the Certified Statement of
12 Expenditure is not provided, or is inaccurate USTDA shall be entitled to a refund from
13 [DBA] of the total amount of the USTDA-disbursed Grant funds” and additionally
14 (2) “USTDA may later audit the costs listed in the Certified Statement of Expenditures
15 and receive a refund from [DBA] to the extent that the Certified Statement of
16 Expenditures is not accurate or the costs shown are not reasonable and documented to
17 explain the composition of costs, rates and basis of allocation.”

18 16. The Success Fee and Cost Share Agreement also provides that if the total costs
19 required to complete the TOR are less than the grant amount provided by USTDA
20 (\$420,432), then the amount disbursed by USTDA will also decrease so that, “the actual
21 [feasibility] Study funding contribution by USTDA and [DBA] must remain proportionate
22 to that set forth in this Success Fee and Cost Share Agreement (USTDA US \$420,432:
23 [DBA] US \$140,160).”

24 17. The Success Fee and Cost Share Agreement also includes a books and records
25 provision requiring DBA to “maintain, in accordance with generally accepted accounting
26 procedures, books, records, and other documents, sufficient to reflect properly all
27 transactions under or in connection with this Success Fee and Cost Share Agreement.”
28 The Success Fee and Cost Share Agreement further requires that DBA’s “books, records,

1 and other documents shall clearly identify and track . . . the total cost of the [feasibility]
2 Study including the Cost Share.”

3 **ALLEGATIONS**

4 18. DBA’s invoices breached: (1) DBA’s contractual responsibility to seek
5 reimbursement for its *actual* costs and expenses incurred in performing the feasibility
6 study, and (2) DBA’s contractual responsibility to provide its agreed upon share of
7 expenses pursuant to the cost sharing provisions of the Grant Agreement.

8 19. Pursuant to the terms of the Success Fee and Cost Share Agreement, DBA was
9 also required to submit a Certified Statement of Expenditures in support of the invoices
10 submitted to and paid by USTDA. DBA’s Certified Statements of Expenditures breached
11 DBA’s contractual responsibility to fully and accurately account for the costs an expenses
12 incurred in its performance of the feasibility study.

13 **DAMAGES**

14 **CLAIMS FOR RELIEF**

15 **COUNT I: Breach of Contract**

16 20. The United States incorporates by reference paragraphs 1-19 of this Complaint
17 set out above as if fully set forth.

18 21. This is a claim for beach of contract for the recovery of monies paid by the
19 United States to Defendants (directly or indirectly), for activities undertaken by DBA in
20 conflict with the Success Fee and Cost Share Agreement, a contract between the United
21 States and DBA, and DBA’s Contract with ENAPOR, in connection with which USTDA
22 was a third-party beneficiary.

23 22. In violation of the Success Fee and Cost Share Agreement and DBA’s Contract
24 with ENAPOR, DBA failed to adequately maintain its books and records, failed to file an
25 accurate Certified Statement of Expenditures, and failed to cover its proportionate amount
26 of funding pursuant to the cost share requirement of the contract.

27 23. As a result of these contractual violations, the United States is entitled to the
28 full amount of the grant funds disbursed to DBA.

PRAYER

WHEREFORE, the United States prays for judgment against the Defendants as follows:

For the damages sustained and/or amounts Defendants received as a result of their failure to comply with the terms of the Success Fee and Cost Share Agreement with USTDA and the Contract with ENAPOR, in connection with which USTDA was a third-party beneficiary; and

That the United States recovers such other and further relief as the Court deems just and proper.

DATED this 11th day of January, 2011.

Respectfully submitted,

JENNY A. DURKAN
United States Attorney
Western District of Washington

s/ David R. East

DAVID R. EAST
HAROLD A. MALKIN
Assistant United States Attorneys
United States Attorney's Office
700 Stewart Street, Suite 5220
Seattle, Washington 98101-1271
Phone (206) 553-1018
Fax: (206) 553-4073
E-Mail: David.East@usdoj.gov
E-Mail: Harold.Malkin@usdoj.gov